

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
WILLOW CREEK BASIN (41N)  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANTS: Gary A. Wolfe; Harry L. Wolfe

**CASE: 41N-0241-R-2022**

41N 121469-00

41N 121473-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

## MASTER'S REPORT

All water right claims that appeared in the Preliminary Decree for Willow Creek (Basin 41N) were subject to “issue remarks” resulting from pre-decree examination by the DNRC, objections, and counterobjections.

Claims 41N 121469-00 and 41N 121473-00 were consolidated into Case 41N-0241-R-2022 to resolve the issue remarks.

### FINDINGS OF FACT

1. Claim 41N 121469-00 received the following substantive issue remark:

THE PLACE OF USE APPEARS TO BE INCORRECT. THE CORRECT PLACE OF USE LEGAL LAND DESCRIPTION APPEARS TO BE IN THE S2SENE AND N2NESE SEC 27 TWP 33N RGE 1E TOOLE COUNTY.

- Claim 41N 121473-00 received the following substantive issue remark:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE SPRING CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

2. On June 20, 2022, Claimants Gary A. Wolfe and Harry L. Wolfe filed *Response* stating that the claimed places of use for claim 41N 121469-00 of N2 Sec 27, Twp 33N, Rge 1W is actually correct because the proposed place of use, listed in the issue remark above, surrounds a natural wetland and perennial spring that is not associated with the dam. Claimant also attached an aerial map showing the correct place of use to the *Response*. Additionally, the *Response* states the point of diversion should be modified from SESENE Sec 27, Twp 33N, Rge 1W to SENWNW Sec 27 Twp 33N Rge 1W to bring the claim into historical conformity. Lastly, the *Response* addresses claim 41N 121473-00 stating that the claimed point of diversion is indeed incorrect as alluded to by the issue remark above, and that the correct point of diversion for claim 41N 121473-00 is in the NENWNE of Sec 28, Twp 33N, Rge 1W. Claimant also attached an aerial map showing the correct point of diversion for claim 41N 121473-00 to the *Response*.

3. Claim 41N 121469-00 also received a notice-type issue remark during the DNRC's claim reexamination.

### PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is "more probable than not." *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

### CONCLUSIONS OF LAW

1. The information in the record is sufficient to resolve the above-listed issue remarks appearing on the claims. Claimant's *Response* shows by a preponderance of the evidence that those elements should be modified as described in Finding of Fact No. 2.

These modifications resolve the issue remarks, and the issue remarks should be removed from the claims.

2. The notice-type issue remark appearing on claim 41N 121469-00 served its notice purpose and should be removed from the claim.

### RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

Post decree abstracts of the water right claims reflecting the recommended changes are attached to this Report.

### **ELECTRONICALLY SIGNED AND DATED BELOW.**

#### **Service via USPS Mail:**

Gary A. Wolfe  
P.O. Box 851  
Shelby, MT 59474-0851

Harry L. Wolfe  
P.O. Box 758  
Shelby, MT 59474-0758

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**WILLOW CREEK**  
**BASIN 41N**

**Water Right Number:** 41N 121469-00 STATEMENT OF CLAIM  
**Version:** 4 -- POST DECREE  
**Status:** ACTIVE

**Owners:** GARY A WOLFE  
PO BOX 851  
SHELBY, MT 59474 0851  
  
HARRY L WOLFE  
PO BOX 758  
SHELBY, MT 59474 0758

**Priority Date:** DECEMBER 31, 1965  
**Type of Historical Right:** USE  
**Purpose (use):** STOCK

**\*Flow Rate:** NO FLOW RATE HAS BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** WEST FORK WILLOW CREEK  
**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENWNW	27	33N	1W	TOOLE

**\*Period of Diversion:** FEBRUARY 1 TO AUGUST 30  
**Diversion Means:** DAM  
**Reservoir:** ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SENWNW	27	33N	1W	TOOLE

**Diversion to Reservoir:** DIVERSION # 1

**Dam Height:** 13.00 FEET  
**Depth:** 10.00 FEET  
**Surface Area:** 6.86 ACRES  
**Capacity:** 27.44 ACRE-FEET

**Period of Use:** APRIL 1 TO NOVEMBER 30  
**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			N2	27	33N	1W	TOOLE

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
WILLOW CREEK  
BASIN 41N**

**Water Right Number:** 41N 121473-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** GARY A WOLFE  
PO BOX 851  
SHELBY, MT 59474 0851

HARRY L WOLFE  
PO BOX 758  
SHELBY, MT 59474 0758

**Priority Date:** DECEMBER 31, 1909

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**Flow Rate:** 20.00 GPM

**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** SPRING, UNNAMED TRIBUTARY OF WEST FORK WILLOW CREEK

**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENWNE	28	33N	1W	TOOLE

**Period of Diversion:** MAY 1 TO OCTOBER 31

**Diversion Means:** FLOWING

**Period of Use:** MAY 1 TO OCTOBER 31

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SESENW	28	33N	1W	TOOLE